

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRIAN DUANE NOEL, §
§
VS. § CIVIL ACTION NO.4:10-CV-571-Y
§
RICK THALER, §
Director, T.D.C.J. §
Correctional Institutions Div., §

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS

In this action brought by petitioner Brian Duane Noel under 28 U.S.C. § 2254, the Court has made an independent review of the following matters in the above-styled and numbered cause:

1. The pleadings and record;
2. The proposed findings, conclusions, and recommendation of the United States magistrate judge filed on October 13, 2010; and
3. The petitioner's three separate written objections to the proposed findings, conclusions, and recommendation of the United States magistrate judge filed on October 28, October 29, and November 1, 2010.

The Court, after **de novo** review, concludes that the Petitioner's objections must be overruled, that the first three grounds for relief, claiming that the trial court lacked jurisdiction, that his guilty plea was involuntary due to the ineffective assistance of counsel, and that his guilty plea was involuntary because the state withheld *Brady* material, should be dismissed with prejudice, and the remaining grounds for relief, that the denial of his state habeas application was based on judicial bias (grounds four and five), and his conviction was based upon the failure by the Texas Court of Criminal Appeals to follow the legal principle of *stare decisis* in the state habeas proceedings, must be denied, for the reasons stated in the magistrate judge's findings and conclusions.

Therefore, the findings, conclusions and recommendation of the magistrate judge are ADOPTED.

Petitioner Noel's grounds for relief one through three in the petition for writ of habeas corpus, are DISMISSED WITH PREJUDICE, and the remaining grounds for relief are DENIED.

Certificate of Appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.¹ Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."² The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."³ A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."⁴

Upon review and consideration of the record in the above-referenced case as to whether petitioner Brian Duane Noel made a showing that reasonable jurists would question this Court's rulings, the Court determines he has not and that a certificate of

¹See FED. R. APP. P. 22(b).

²RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS, RULE 11(a) (December 1, 2009).

³28 U.S.C.A. § 2253(c)(2)(West 2006).

⁴*Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003), citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

appealability should not issue for the reasons stated in the October 13, 2010, Findings, Conclusions, and Recommendation of the United States Magistrate Judge.⁵

Therefore, a certificate of appealability should not issue.

SIGNED November 15, 2010.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

⁵See FED. R. APP. P. 22(b); see also 28 U.S.C.A. § 2253(c)(2) (West 2006).